

Forward

This document is both a report and a recommended guide to provide information to the 59th Legislature regarding the process of funding, designing, and constructing projects for State government and to help serve as a decision-making tool regarding procurement of the same through potential implementation of alternative delivery/contracting systems.

The major objective of this document is to meet, and hopefully exceed, the request of the 58th Legislature as defined in HJR #28 regarding the following: “Best Value” decision-making; open and equitable selection processes; qualified members involved in procurement evaluations; and ensure taxpayers receive the most cost-effective projects.

The report portion examines current legislation and current State practice, rulings by the Montana Supreme Court in matters of construction, pre-design planning and programming efforts, and how “Best Value” can be defined.

Regardless of the delivery method used, the recommendations portion of the document explains how the State can deliver construction projects within various frameworks, whether it’s through the current low-bid Design/Bid/Building methodology or through Design/Build based upon hiring of performance (at the most appropriate cost within established budgets).

A significant number of documents on this topic exist within the construction industry that have been developed by a multitude of highly qualified entities, both public and private. This report attempts to consolidate some of the most important aspects, summarize them, and tailor them to the Legislature’s specific request as expressed in HJR #28.

Acknowledgements

While the Architecture & Engineering Division of the Department of Administration was given the primary task of assembling this report, it would not have been possible without the collaborative involvement and input from many different sectors of Montana.

Those participating are acknowledged and thanked for taking their own time, effort, and expense to be involved in the development of this document:

Honorable Rep. Michael Lange, House District #19

Cary Hegreberg, Executive Director, Montana Contractors Association

Carl Schweitzer, Executive Director, Associated Subcontractors of Montana

Jay Skoog, American Council of Engineering Companies, Montana Chapter

Clark Llwellyn, American Institute of Architects, Montana Chapter

Robert Lashaway, Director of Facilities Services, Montana State University

Mike Everts, School of Architecture, Montana State University

Hugh Jesse, Director of Facilities Services, University of Montana

Neil Westesen, Crowley Law Offices, P.S.

Chuck Hanson, TD&H Engineers

Kathleen Stratton, MKK Engineers

Mike Radke, CTA Architects Engineers

Cliff Chisholm, Place Architecture

Richard Shanahan, Shanahan Architects

Jeanne Wolfe, Procurement Bureau, General Services Division, Dept. of Administration

Table of Contents

Forward		
Acknowledgements		
Executive Summary		
ONE	INTRODUCTION	
	Purpose	1
	Background	2
	Definitions.....	2
	Public Owners	4
	Current Statute	4
TWO	DEFINING BEST VALUE	
	“Best Value” – What is it?	7
	Researching “Best Value”	8
	Current Montana Legal Rulings Pertaining to Low Bid	9
THREE	PRE-DESIGN PHASE	
	Prior to a “Best Value” Decision	13
	Implementing Pre-Design	14
	The Cost of Pre-Design	17
FOUR	BEST-VALUE DECISION-MAKING PROCESS	
	Is There a Problem with Low-Bid on State Construction?	18
	Best-Value Decision-Making Process for Construction	22
	Major Factors in the Decision-Making Process	25
	Recommendations for HJR #28	42
FIVE	ESTABLISHING CRITERIA FOR THE SELECTION PROCESS	
	How to Establish Criteria for a Selection Process	43
	How to Ensure the Process is Fair, Equitable, and Objective.....	44
	Recommendations for HJR #28	57
SIX	QUALIFICATIONS FOR SELECTION PANELS	
	The Function of Selection Panels.....	58
	The Components of Selection Panels	58
	Instructions to the Selection Panel and TRP	59
	Recommendations for HJR #28	60
SEVEN	GETTING THE MOST COST-EFFECTIVE PROJECT	
	What is a Cost-Effective Project?	61
	How State Budgets are Established for Projects	62
	How State Project Budgets are Used	63
	Selection of the Most Qualified, Best Performing Contractor Leads to the Most Cost-Effective, Best-Value Possible.....	65
	Recommendations for HJR #28	66

BIBLIOGRAPHY68

APPENDIX A HOUSE JOINT RESOLUTION #28, 58TH LEGISLATURE.....69

APPENDIX B DEVELOPING RFP SPECIFICATIONS71

APPENDIX C SAMPLE RFP TECHNICAL SUBMITTAL REQUIREMENTS.....78

APPENDIX D EXAMPLE RFP TECHNICAL EVALUATION CRITERIA83

Executive Summary

This report and the recommendations provided herein are intended to assist the Legislature in reviewing the current practice of awarding state construction projects and provide a framework for implementing alternative delivery contracting methods, should such opportunities be approved. The information provided is sufficiently detailed yet not exhaustive of the many practices within the industry used to procure new facilities or rehabilitate existing facilities in order to provide the highest quality projects within budget and time constraints and to handle the associated risks in the most progressive and efficient manner possible.

The Department finds that the most significant objection to the State (or any public entity) utilizing contracting methods other than the straight low-bid process is the potential for subjectivity in the selection of contractors. Generally, the alternative processes focus on a qualifications/performance basis rather than solely on the basis of who submits the lowest cost. However, many other states and the federal government have successfully employed alternative contracting means for some time. These other public entities have processes established whereby the most qualified contractors are awarded projects with little disagreement from the private sector provided those processes are open and free of political and other subjective influences.

Certainly the lowest number submitted at bid time is the most objective but it does nothing to indicate the level of skill, ability, integrity, or past experience of any contractor. As referenced in this report, not all contractors are equal and it can be argued that the public is not well served in awarding work to unqualified or minimally qualified entities on a low-bid basis. It can also be debated that the low-bid process is the least efficient and most intensely managed method due to the contractual relationships established to deliver projects, the need for oversight of contractors whose skill levels may not be acceptable, and the driving down of profit margins simply to “win” low-bid work. The lowest bid project does not always equate to the lowest total cost project. Additionally, many of the most highly qualified entities in Montana may not even bid public work because of the low margins involved in low-bid work.

HJR #28 – “Best Value” Construction Contracting Study

Below is a summation of the recommendations, in the order requested in HJR #28, provided within the body of this report:

(1) STATE HOW A DECISION IS REACHED TO AWARD A CONTRACT ON THE BASIS OF "BEST VALUE":

1. Provide funding for Pre-Design Phase effort on a variety of major, selected projects through the Long Range Building Program (6-year projection with the 1st and 2nd years making up the current funding requests) in order to establish project parameters, scope, alternatives, schedules, and cost for significant, viable projects in the 3rd and 4th year LRBP projections (i.e. those projects that will be requested of the subsequent legislature).
2. At the conclusion of the Pre-Design Phase effort, perform an analysis of the Major Factors (identified within the body of the report primarily as schedule, project scope, funding, risk allocation and control) which will lead to the selection of an alternative delivery method based upon performance/qualifications as well as price.
3. Should the legislature not permit alternative delivery methods, or performance/qualifications-based selections, then the State should investigate, detail, and define its requirements to perform work in accordance with Montana Supreme Court rulings (i.e. define the requisite ‘judgment, skill, ability, capacity, and integrity’ in order to perform the work) and place such requirements in the bidding documents. This would be essentially a minimally acceptable standard that would meet the definition of “responsible” presently provided in statute.
4. Changes to statute will be necessary if alternative methods are to be permitted.

(2) ESTABLISH CRITERIA FOR ENSURING A FAIR, EQUITABLE, AND OBJECTIVE SELECTION PROCESS:

1. Absent the ability to use alternative delivery method (Design-Build or Construction Manager @ Risk), it is put forward that the State adopt a “qualifications” outline to be placed in the specifications for use in evaluating whether or not bidders meet the definition of “responsible.” Additionally, the use of performance criteria to use as a functioning two-step process could be implemented whereby the State could generate a short-listing of qualified bidders on each project and then make an award on the basis of the lowest bid submitted.
2. If alternative delivery methods are to be permitted through a change in statute, the State should utilize the guidelines provided in this report for development of RFQ and RFP criteria. Evaluations must be conducted in a formally scored process with the results made available to the public.

(3) DETERMINE QUALIFICATIONS FOR MEMBERS OF SELECTION PANELS USED TO AWARD CONTRACTS:

1. Use members experienced in design and/or construction who are responsible for the delivery of public projects (e.g. the administrator of the Architecture & Engineering Division, Division project managers, agency facilities personnel, private sector designers/contractors without a pecuniary or other interest, etc.).
2. Define a sufficient number of knowledgeable members for each project and maintain the same individuals throughout the entire selection process.

(4) ESTABLISH A PROCESS ENSURING THAT TAXPAYERS RECEIVE THE MOST COST-EFFECTIVE PROJECT POSSIBLE:

1. Select the most qualified, best performing design team to develop documents appropriate for the delivery method chosen:
 - a. Low-Bid - full plans and specifications for Design-Bid-Build.
 - b. Two-Step Qualified Low-Bid – request for qualifications (RFQ) package to assist in short-listing contractors and then full plans and specifications for a low-bid D-B-B from the short-list with price as the sole criteria.
 - c. Two-Step Qualification-Base Bid – request for qualifications (RFQ) package to assist in short-listing contractors and then full plans and specifications for a qualification-based only selection from the short-list with price as a factor but not the sole criteria.
 - d. Two-Step Design-Build – RFQ and RFP packages and assistance in scoring. Method can be either low-bid or qualification/performance-based selection.
2. Select the most qualified, best performing contractor through utilization of the guidelines identified in this report regardless of the delivery method chosen:

Exception to all Two-Step methods of contractor selection is D-B-D, Low-Bid only. The State anticipates it would continue doing a considerable number of projects by its current process even if a qualification/performance-based process is defined in statute and if alternative delivery methods are made available. It is anticipated that alternative selection and contracting methods would be performed only on select projects.

Should the legislature choose to permit the Department to implement methods other than strictly low-bid, the guidelines offered throughout this report can help ensure the public and its elected representatives that the processes are fair, equitable, appropriate, open for review, and free from political influence.